A

CHAN HAK FOON

v.

SUTERA HARBOUR SDN BHD & ANOR

B HIGH COURT SABAH & SARAWAK, KOTA KINABALU
ZULKIFLI BAKAR J
[ORIGINATING SUMMONS NO: K24-06-2006]
27 NOVEMBER 2008

C ***CIVIL PROCEDURE:*** *Judgments and orders - Setting aside - Application for - Application for an order that registration under Reciprocal Enforcement of Judgment Act 1958 (REJA) of a judgment be set aside - Whether requirement under s. 5(1)(a) REJA satisfied - Whether condition under s. 5(2)(a) REJA fulfilled for registration of foreign judgment -* D *Whether enforcement of judgment contrary to public policy - Whether judgment creditor had misled and deceived the court into applying Hong Kong law*

This was an application for an order that the registration under the E Reciprocal Enforcement of Judgment Act 1958 of the judgment dated 18 October 2005 of the Court of First Instance, High Court of the Hong Kong Special Administrative Region ('the judgment') be set aside. The issues that arose were (i) whether the requirement under s. 5(1)(a) Reciprocal Enforcement of Judgment Act 1958 F ('REJA') had been satisfied before the registration could be set aside and whether the condition under s. 5(2)(a) of REJA must be fulfilled for registration of foreign judgment; (ii) whether judgment debtor should apply at Hong Kong Court when they want to dispute Hong Kong Court since it was not a convenient forum to G try the matter; (iii) whether there was a forum shopping on the part of judgment creditor to unjustly profit from his alleged misfortune; (iv) whether enforcement of the said judgment would be contrary to public policy and (v) whether by resorting to the Hong Kong Court as the forum to try the case, the judgment creditor had misled and deceived the court into applying the Hong Kong law. H

Held (dismissing the application by the judgment debtors):

(1) Where there is evidence that the original court has jurisdiction over the matter, the deeming provisions need not be relied upon I by the party seeking to enforce the judgment. Section 5(2)(a)

REJA is only a deeming provision. In addition, s. 5(2)(c) of the REJA points out that 'if the jurisdiction of the original court is recognized by the law of Malaysia' which can be read together with the First Schedule in REJA 1958 where it was stated that Hong Kong is a reciprocating country. Hence, the original court, in particular the Hong Kong court in this case, had jurisdiction to hear the matter and application to set aside the said registration must fail. (paras 8 & 9)

(2) If the judgment debtors wished to dispute that the Hong Kong Court had applied the wrong law, they should do so in Hong Kong courts. Besides, as stated in the affidavit of Chan Hak Foon (encl. 44), there were four eyewitnesses to the accident, two of whom resided and still reside in Hong Kong. (para 12)

(3) It was not proper for our court to say that for a foreign court had erred by applying its own laws. Only the superior court of the said same country should decide if the said court had misdirected itself in applying the law. This has always been the practice and the rules. Judgment debtor should have done this in Hong Kong and not in Malaysian court. (para 13)

(4) The judgment debtors had submitted by enforcing the said judgment, it would be contrary to public policy because the judgment debtors effectively had to pay more than what they should be paying when Hong Kong laws were applied to determine the amount of damages. This court found that suing for a compensation for injuries sustained in an accident did not tantamount to infringement of public policy. The case of *Aspinall Curzon Ltd v. Khoo Teng Hock* dealt with transaction of gaming at a licensed gaming casino. In that case, even this kind of transaction was recognized by the Malaysian court as long as it was lawful and done in accordance with Malaysian law. (*Banque Nasionale De Paris v. Wuan Swee May & Anor*). (paras 14, 15, 16 & 17)

(5) There was no evidence from the judgment debtors to substantiate their allegation that the judgment creditor had misled or deceived the Hong Kong court into applying the wrong laws. If the Hong Kong court found that the tort was in substance committed in Hong Kong, then no doubt the laws of Hong Kong should apply. On the other hand, if the Hong Kong court finds that the tort was in substance committed in

A Malaysia, then the laws of Hong Kong would still be the applicable law if the Rule of Double Actionability was satisfied. In this case, the Rule of Double Actionability was satisfied in the circumstances of this case and the judgment debtors had failed to show otherwise. (para 19)

B **Case(s) referred to:**

Banque Nasionale De Paris v. Wuan Swee May & Anor [2000] 4 CLJ 387 HC ***(refd)***

The Aspinall Curzon Ltd v. Khoo Teng Hock [1991] 1 LNS 6 HC ***(refd)***

United Malayan Banking Corp Bhd v. Soo Lean Tooi & Ors [1982] 1 LNS
C *117 HC* ***(refd)***

Legislation referred to:

Limitation Ordinance (Cap 72) (Sabah), s. 3 part II

Reciprocal Enforcement of Judgments Act 1958, ss. 4, 5(1)(a), (2)(a), (c),
D (3)

For the judgment creditor - Chia Yuen Fong; M/s Chin Lau Wong & Foo
For the judgment debtor - Catherine Chau; M/s Catherine Chau & Assoc

Reported by Suhainah Wahiduddin

E

JUDGMENT

Zulkifli Bakar J:

F **Background**

[1] This is an appeal by judgment debtors against my decision made on 27 November 2008 wherein I dismissed the application by judgment debtors under encl. 37 with costs to be taxed unless
G otherwise agreed. Enclosure 37 is an application for an order that the registration under the Reciprocal Enforcement of Judgment Act, 1958 (Act 99) of the judgment dated 18 October 2005 of the court of first instance, High Court of the Hong Kong Special Administrative Region (hereinafter referred as "the judgment") be
H set aside.

Brief Facts And Chronology

[2] The background facts leading to this action by the judgment creditors are these. On 18 October 2005, the judgment creditor
I obtained judgment in default of appearance against the judgment debtors in the court of first instance, High Court of the Hong

Kong Special Administrative Region. On 13 December 2006, the judgment creditor obtained an order for registration of the judgment at the High Court of Sabah and Sarawak at Kota Kinabalu.

Judgment Debtor's Submissions

Reasons To Set Aside The Judgment

[3] Overall, there are five reasons submitted by judgment debtors to justify their application, ie:

(a) Judgment debtors are incorporated in Malaysia. Judgment debtor were neither carrying on business nor ordinarily resident within the jurisdiction of the original court at Hong Kong. They also do not have a place of business or any assets in Hong Kong.

(b) Judgment debtors did not voluntarily or submit to the jurisdiction of the original court.

(c) The accident which caused the alleged injuries to the judgment creditor occurred at the premises of the judgment debtor in Sabah, Malaysia.

(d) Enforcement of judgment would be contrary to public policy in Malaysia.

(e) Proceedings instituted by judgment creditor to register the judgment of a foreign court is time-barred under s. 3, Part II of the Limitation Ordinance (Sabah Cap. 72).

Judgment Creditor's Submissions

[4] On the contrary, judgment creditor submitted as follows;

(a) Judgment creditor admitted that judgment debtors do not have an office in Hong Kong. However, they do actively solicit business in Hong Kong by cooperating with travel agencies in Hong Kong to patronize the integrated resort owned by the judgment debtors and where the accident took place.

(b) Substantial part of damages arising from the accident was sustained by judgment creditor in Hong Kong even though the accident which cause injuries occurred at Sabah. For example, judgment debtor was hospitalized in Queen Mary Hospital in Hong Kong for 39 days since 10 August 2000. (ie, four days after the accident).

(c) As for forum of convenience, there were four eye-witnesses to the accident, two of whom resided and still reside in Hong Kong and it was not really possible for judgment creditor to attend trial in Malaysia since having regard to the injuries that he had suffered and the various treatments which he received after the accident.

(d) This case could be tried more expeditiously and economically in Hong Kong because of the existence of a special procedural regime governing personal injury action in the High Court of Hong Kong.

(e) There is not a reason for impeaching a foreign judgment on grounds of public policy.

Findings Of The Court

[5] I now deal with the issues as follows:

(a) Whether requirement under s. 5(1)(a) Reciprocal Enforcement of Judgments Act 1958 ("REJA") has been satisfied before the registration can be set aside and whether condition under s. 5(2)(a) of REJA must be fulfilled for registration of foreign judgment.

(b) Whether judgment debtor should apply at Hong Kong Court when they want to dispute Hong Kong Court since it is not a convenient forum to try this matter.

(c) Whether there is a forum shopping on the part of judgment creditor to unjustly profit from his alleged misfortune.

(d) Whether enforcement of the said judgment would be contrary to public policy.

(e) Whether by resorting to the Hong Kong court as the forum to try this case, the judgment creditor had misled and deceived the court into applying the Hong Kong law.

Whether Requirement Under s. 5(1)(A) Reciprocal Enforcement Of Judgment Act 1958 ("Reja") Has Been Satisfied Before The Registration Can Be Set Aside And Whether Condition Under s. 5(2)(A) Of Reja Must Be Fulfilled For Registration Of Foreign Judgment

[6] There are few options for judgment debtors to set aside the registration of the foreign judgment. Section 5(1)(a) has laid down the said provisions. For easy reference, I reproduced the said section as follows:

5. Cases in which registered judgments must, or may, be set aside. A

(1) On an application in that behalf duly made by any party against whom a registered judgment may be enforced, the registration of the judgment:

(a) shall be set aside if the registering court is satisfied: B

(i) that the judgment is not a judgment to which this Part applies or was registered in contravention of this Act;

(ii) that the courts of the country of the original court had no jurisdiction in the circumstances of the case; C

(iii) that the judgment debtor, being the defendant in the proceedings in the original court, did not (notwithstanding that process may have been duly served on him in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear; D

(iv) that the judgment was obtained by fraud;

(v) that the enforcement of the judgment would be contrary to public policy in Malaysia; or E

(vi) that the rights under the judgment are not vested in the person by whom the application for registration was made; and F

(b) may be set aside if the registering court is satisfied that the matter in dispute in the proceedings in the original court had previously to the date of the judgment in the original court been the subject of a final and conclusive judgment by a court having jurisdiction in the matter. G

[7] Before I answer the question posed here, it is pertinent to further examined s. 5(2)(a) of REJA 1958, which provide as follows;

(2) For the purposes of this section the courts of the country of the original court shall, subject to subsection (3), be deemed to have had jurisdiction: H

(a) in the case of a judgment given in an action in *personam*:

(i) if the judgment debtor, being a defendant in the original court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings otherwise than I

for the purpose of protecting, or obtaining the release of, property seized, or threatened with seizure, in the proceedings or of contesting the jurisdiction of that court;

(ii) if the judgment debtor was plaintiff in, or counter-claimed in, the proceedings in the original court;

(iii) if the judgment debtor, being a defendant in the original court, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings to submit to the jurisdiction of that court or of the courts of the country of that court;

(iv) if the judgment debtor, being a defendant in the original court, was at the time when the proceedings were instituted resident in, or being a body corporate had its principal place of business in, the country of that court; or

(v) if the judgment debtor, being a defendant in the original court, had an office or place of business in the country of that court and the proceedings in that court were in respect of a transaction effected through or at that office or place;

(b) in the case of a judgment given in an action of which the subject matter was immovable property or in an action in rem of which the subject matter was movable property, if the property in question was at the time of the proceedings in the original court situate in the country of that court; and

(c) in the case of a judgment given in an action other than any such action as is mentioned in paragraph (a) or (b), if the jurisdiction of the original court is recognized by the law of Malaysia.

(3) Notwithstanding anything in subsection (2), the courts of the country of the original court shall not be deemed to have had jurisdiction:

(a) if the subject matter of the proceedings was immovable property outside the country of the original court;

(b) except in the cases mentioned in subsection (2)(a)(i), (ii) and (iii) and (c), if the bringing of the proceedings in the original court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of the country of that court; or

(c) if the judgment debtor, being a defendant in the original proceedings, was a person who under the rules of public international law was entitled to immunity from the jurisdiction of the courts of the country of the original court and did not submit to the jurisdiction of that court.

[8] It was argued by the judgment debtor that judgment creditor had failed to comply with requirement under s. 5(2)(a) which enable them to set aside the said judgment. So, the pertinent question arise here is whether Hong Kong court do not have jurisdiction over this matter? If the answer is in the affirmative, then this court ought to allow the judgment debtors application. However, to analyze further this proviso, it is indeed sub-s. (3) of s. 5 is only deeming provision. The same goes to sub-s. (2)(a) of s. 5. Thus, where there is an evidence that the original court did have jurisdiction over the matter, the deeming provisions need not be relied upon by the party seeking to enforce the judgment.

[9] It is my findings and I agree with submissions by judgment creditor that s. 5(2)(a) is only a deeming provision. I wish to refer to Yusof Abdul Rashid J where he said in *United Malayan Banking Corp Bhd v. Soo Lean Tooi & Ors* [1982] 1 LNS 117:

> In my view, if the respondent was not one of those persons specified under section 5(2)(a) of Act 99, it did not necessarily mean that the original court had no jurisdiction on the respondent. To put it differently, it was not correct to allege that unless the plaintiffs could establish that the respondent was one of those persons mentioned under section 5(2)(a) of Act 99, the plaintiffs had failed to prove that the original court had jurisdiction over the respondent. To my mind, if the respondent was one of those persons, then the original court was deemed to have jurisdiction without any need for the plaintiffs to adduce any evidence to prove that the original court indeed had such jurisdiction.
>
> The provisions of section 5(2)(a) of Act 99 create but rebuttable presumptions in relation to laws purported to be in force in the country of the original court, the existence of which required no formal proof. However, where proof is available regarding relevant laws relating to the jurisdiction of the original court, the presumptions need not be relied on in order to establish that in fact that original court had jurisdiction to try the original proceedings. It follows that where the plaintiffs fail to raise any of the rebuttable presumptions under the said section 5(2)(a) of Act 99 or otherwise that the respondent has successfully rebutted those presumptions, it does not necessarily mean that the original court, in the circumstances, had no jurisdiction over the respondent.

[10] In addition, s. 5(2)(c) of the REJA has pointed out that "if the jurisdiction of the original court is recognized by the law of Malaysia." This particular section also may be read together with the First Schedule in REJA 1958 which stated that Hong Kong is a reciprocating country. Based on the above reasons, without hesitation I must say that original court, in particular Hong Kong court in this case do in fact have jurisdiction to hear this matter and application to set aside the said registration must fail.

Whether Judgment Debtor Should Apply At Hong Kong Court When They Want To Dispute Hong Kong Court Since It Is Not A Convenient Forum To Try This Matter

[11] Judgment debtors had submitted that Hong Kong court was not a convenient forum to try this matter and Hong Kong court has applied the wrong law in assessing damages.

[12] With regards of this point, I must say that the above ground was not provided under s. 5(1)(a) of the REJA Act 1958 which enable them to set aside registration of the said judgment. If judgment debtors wish to dispute that the Hong Kong court has applied the wrong law, they should do so in Hong Kong courts. Besides, as stated in the affidavit Chan Hak Foon (encl. 44) there were four eye-witnesses to the accident, two of whom resided and still reside in Hong Kong.

Whether There Is A Forum Shopping On The Part Of Judgment Creditor To Unjustly Profit From His Alleged Misfortune

[13] Valid ground to set aside registration of the said judgment is stated clearly under s. 5(1)(a) of the REJA Act 1958. I found nowhere in the said section dealt with forum shopping. Judgment debtor's counsel had submitted that Hong Kong court has erred in applying Hong Kong laws in assessing damages in this case. With due respect, I do not accept this contention. It is not proper for our court to say that foreign court had erred by applying their own laws. If we were to do that, perhaps it may lead to chaos to our judicial system and create conflict of laws. Only the superior courts of the said same country should decide if the said court has misdirected itself in applying the law. This is always been the practice and the rules. Counsel for judgment debtor shall do this in Hong Kong court and not in Malaysian Court.

Whether Enforcement Of The Said Judgment Would Be Contrary To Public Policy

[14] Judgment debtors had submitted by enforcing the said judgment, it would be contrary to public policy because judgment debtors effectively have to pay more than what they should be paying when Hong Kong laws were applied to determine the amount of damages. The pertinent question posed here is whether this courts finds it contrary to our public policy? Is suing for a compensation for injuries sustained in an accident tantamount to infringement to public policy?

[15] As an example in the case of *The Aspinall Curzon Ltd v. Khoo Teng Hock* [1991] 1 LNS 6; [1991] 2 MLJ 484 *(Aspinall Curzon)* the plaintiff, a licensed gambling casino, obtained in the High Court of England a judgment against the defendant and subsequently applied to the High Court in Kuala Lumpur to have the judgment registered under s. 4 of the Reciprocal Enforcement of Judgments Act 1958. The application was granted by the senior assistant registrar and the defendant's application to set aside the order was dismissed. The defendant appealed to the judge-in-chambers. On appeal, the defendant argued that the cheques which were given to the plaintiff (in exchange for cash and gaming chips) were given for illegal consideration, or alternatively that the judgment was for gambling debt, and should not be enforced, for being against public policy.

It was held, in dismissing the defendant's appeal, that:

(1) Had the contract been entered in this country it had been so executed with lawful consideration, and s. 24 of the Contracts Act 1950 cannot apply to make it void.

(2) The cheques were issued in exchange for cash and gaming chips for purposes of gaming at a licensed gaming casino. It is not for an unlawful purpose by the law of England. Had such transaction occurred in this country, it is a lawful transaction provided that the gaming is done in a gaming premises licensed by the Finance Minister under s. 27A of the Common Gaming House Act 1953. The enforcement of the UK judgment cannot be considered as against the public policy of Malaysia.

[16] The above case dealt with transaction of gaming at a licensed gaming casino. In that case even this kind of transaction was recognized by our court as long as it is lawful and done in accordance with Malaysian law. What more in the situation of our instant case.

[17] I also strongly feel that we should refer further the question of public policy in *Banque Nasionale De Paris v. Wuan Swee May & Anor* [2000] 4 CLJ 387 Abdul Hamid Mohamad J (as he then was) said:

> So, when a Malaysian court is considering the issue of public policy in Malaysia, it should look at Malaysian law, Malaysian government policy, Malaysian moral values and all other relevant factors then prevailing in Malaysia, including what I have mentioned earlier. I know that some people may not feel comfortable with the use of the words 'government policy'. In my view, it is a relevant factor. I am also of the view that it is wrong to 'marginalize' government policies in considering what is the public policy in Malaysia. Who can better claim to represent the public than a democratically elected government? Who is more responsible for the welfare of the people and the country than the government of that country? Who is more responsible for the law and order, economy, education and indeed everything affecting the people and the country, than the government of that country?

[18] At such, judgment debtor's submissions on this ground must fail.

Whether By Resorting To The Hong Kong Court As The Forum To Try This Case, The Judgment Creditor Had Misled And Deceived The Court Into Applying The Hong Kong Laws

[19] On this point, I agree with learned counsel for judgment creditor's argument. There is no evidence from judgment debtors to substantiate their allegation that judgment creditor has misled or deceived the Hong Kong court into applying the wrong laws. If the Hong Kong court finds that the tort was in substance committed in Hong Kong, then no doubt the laws of Hong Kong should apply. On the other hand, if the Hong Kong court finds that the tort was in substance committed in Malaysia, then the laws of Hong Kong would still be the applicable law if the Rule of Double Actionability is satisfied. I also agree that Rule of Double Actionability is satisfied in the circumstances of this case and the judgment debtors had failed to show otherwise.

[20] For the foregoing reasons, I dismissed the application by the judgment debtors to set aside the registration of the judgment with costs to be taxed unless otherwise agreed.